

Liability and risks in project cargo from a civil law perspective

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Critical issues

Interplay between contract of logistics and contract between Employer and Contractor for the realization of the project (FIDIC, Orgalime, ICC)

Contract of logistics vs. supply of services (*"appalto"*).

Applicable law if no election. Law applicable to multimodal carriage

Time sensitive projects: penalties and LD clauses, harsh termination clauses, performance bonds

Adoption of standard forms (BIMCO Heavycon and Heavyliftvoy, Supplytime 1989, Bargehire, Towcon, LOGIC) vs. *ad hoc* contracts.

Several P&I Clubs have introduced a rule making clear that shipowners are only covered if they use BIMCO forms or obtain agreement on an alternative contract from Club managers.

Knock for knock

Heavycon 2007

Owners - Notwithstanding anything else contained in this Charter Party ... the Charterers shall not be responsible for loss of or damage to the property of any member of the Owners' Group, including the Vessel, any liability in respect of wreck removal ... any liability in respect of personal injury or death of any member of the Owners' Group ... arising out of or in any way connected with the performance of this Charter Party, even if such loss, damage, injury or death is caused wholly or partially by the act, neglect, or default of the Charterers' Group; and the Owners shall indemnify, protect, defend and hold harmless the Charterers from any and against all claims, costs, expenses, actions, proceedings, suits, demands and liabilities whatsoever arising out of or in connection with such loss, damage, personal injury or death.

Knock for knock

Operation of the *knock for knock* clause in case of gross negligence/willful misconduct?

In many civil law systems clauses excluding or limiting liability are void /ineffective in case of intention or gross negligence.

Es. Article 1229 of the Italian civil code. Article 1102 Spanish civil code.

Norwegian law: the parties cannot validly exempt themselves from liability arising out of intent or willful misconduct; *the Njord B* case: impossibility to rely on the knock for knock clause in case of gross negligence

Limitation / exclusion of liability

Which kind of damages can be recovered?

Common law: *Hadley v. Baxendale*

“damages

i. arising naturally i.e. according to the usual course of things from such breach of contract itself or

ii. such as may reasonably be supposed to have been in contemplation of both parties at the time they made the contract as the probable result of the breach of it.”

i) direct damages/losses,

ii) consequential/indirect damages or losses

Limitation / exclusion of liability

[Transocean Drilling UK Ltd v Providence Resources plc](#)

20. CONSEQUENTIAL LOSS

For the purposes of this Clause 20 the expression "Consequential Loss" shall mean:

any indirect or consequential loss or damages under English law, and/or to the extent not covered by (i) above, loss or deferment of production, loss of product, loss of use (including, without limitation, loss of use or the cost of use of property, equipment, materials and services including without limitation, those provided by contractors or subcontractors of every tier or by third parties).....



Article 1223 and 1225 Italian civil code

Damages immediately and directly arising from the breach, and foreseeable

Other civil law jurisdictions?

Limitation/exclusion of liability

Scottish Power UK Plc v BP Exploration Operating Company Ltd and others
2015

“neither Party shall be liable to the other Party for any loss of use, profits, contracts, production or revenue or for business interruption howsoever caused and even where the same is caused by the negligence or breach of duty of the other Party.”

‘Reasonable and Prudent Operator: a Person seeking in good faith to perform its contractual obligations and, in so doing and in the general conduct of its undertaking, exercising that degree of skill, diligence, prudence and foresight which would reasonably and ordinarily be expected from a skilled and experienced operator engaged in the same type of undertaking under the same or similar circumstances and conditions, and the expression the ‘Standard of a Reasonable and Prudent Operator’ shall be construed accordingly

Limitation/exclusion of liability

Position in civil law jurisdictions?

Relevance of an explicit reference to a “Reasonable and prudent operator”?

Does this qualify the duty of diligence of the Provider?

Termination

TIMELY PERFORMANCE

PROVIDER's timely performance is a critical element of this Contract.

TERMINATION FOR DEFAULT

a. The COMPANY may, by written notice to Provider, cancel all or part of this Contract: (i) if Provider fails to perform any other provision of this Contract or fails to make progress, so as to endanger performance of this Contract;

.....

e. If, after cancellation, it is determined that Provider was not in default, the rights and remedies of the Parties shall be as if the Contract had been terminated according to the "Termination for Convenience" Article of this Contract.

Termination

Position under Italian law

Entitlement to terminate in case of breach of contract only in case the breach is relevant.

Possibility to stipulate a *clausola risolutiva espressa* providing for the termination of the contract in case of breach of a specific term regardless of the relevance of the provision breached.

Cassazione 11 march 2016 no. 4796

The clause requires that the parties have stipulated the termination for the breach of one or more terms specifically set out, therefore the clause which gives one of the parties the right to terminate in case of serious and reiterated breaches of all the obligations arising from the contract is null and ineffective, being too vague and purely potestative

Termination for convenience and good faith

Implied duty of good faith?

Common law jurisdictions generally reluctant to acknowledge an implied duty of good faith; the parties should be permitted to perform them in line with their freely negotiated expressed intentions.

Yam Seng Pte Ltd v International Trade Corp Ltd (2013)

Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (2013)

certain categories of contract contain an implied duty of good faith, but generally if the parties wish to impose such a duty they must do so expressly.

Termination for convenience and good faith

Cassazione n. 20106/2009

Even if the contract contains a termination for convenience clause the party entitled to terminate is in any case bound to act diligently and in good faith in order to mitigate the consequences arising from an early termination, and the other party might be therefore entitled to claim damages if the termination is too abrupt and unexpected.

No “abuse of right”

Liquidated damages

Liquidated Damages vs. Penalties

LD as “*genuine pre-estimate of damage*”

Clausola penale (Italy, France, Spain.....)

Punitive damages

***Court of Appeal Venice 15 October 2001,
Parrot c. Fimez S.p.a. upheld by the
Supreme Court 1183/2007***

Judgment of the District Court of Jefferson County, Alabama, rendered in a tort case, where an Italian manufacturer was condemned to pay 1.000.000 \$ for punitive damages having allegedly caused the death of the son of the plaintiff involved in a road accident, due to a defect in the design of the buckle of the crash helmet that he was wearing



Punitive damages

The US Court did not specify the apportionment of compensatory and punitive damages against the Italian defendants, and the Court of Appeal of Venice concluded that the award was punitive in nature, and therefore contrary to domestic public policy.

But: partial enforcement (and conservatory arrest/freezing order prior to enforcement) is possible in case the judgement separates the different damages and the punitive damages can be unbundled (Court of Appeal Trieste 3/12/2009)

Punitive damages

On May 16, 2016 the Court of Cassation took a different approach, expressing doubts whether the compensatory damages are the sole remedy available under Italian law, and whether the system is protected by public order.

The Court observed that:

- a) certain provisions of Italian law already provide punitive damages (e.g., in case of vexatious litigation, where the losing party may be ordered to pay punitive damages to the winning party)
- b) the notion of public order has changed over the recent years, and now refers to international public order rather than the domestic one; the Court referred to several decisions issued by courts of other European countries (e.g., in Spain, France, and Germany) where punitive damages were not automatically considered contrary to public order.

Enforcement of performance bonds

English Courts notoriously apply the fraud exception very strictly (although a few recent UK judgments have apparently introduced an element of flexibility to the rule).

The position is partially different under Italian case-law; the test for the fraud exception is slightly more relaxed.

A number of decisions held that the notion of “fraud” encompasses intentional wrongdoing or misrepresentation on the part of the beneficiary.

Burden of proof rests with the party seeking the injunction, and Italian Courts have coined the concept of “prova liquida”, i.e. liquid evidence: fraud or bad faith must be detectable by the judge in light of a preliminary analysis of the matter, without recurring to experts or time consuming disclosure of evidence which would be incompatible with the interim and summary nature of the proceedings.

Enforcement of performance bonds

A relevant hurdle is the so called *periculum in mora*, i.e. the proof that the applicant is exposed to “imminent and irremediable” damages.

The concept has been somewhat widened and softened over the last years, but it is still construed severely by Italian Courts.

The applicant must prove that there is the serious risk that he would be unable recover in the future the undue payment.

It is not strictly necessary to prove that the debtor is dissipating its assets, but the applicant must provide elements suggesting that there is the risk that by the time a judgment or award is made available such assets might be insufficient to ensure the recovery of the sums awarded.

The test is generally pretty severe

Grazie

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